SIONG HOLDINGS SDN. BHD.

v.

DEVELOPMENT & COMMERCIAL BANK BHD.

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-307-1995]
6 NOVEMBER 1996

LAND LAW: *Charge - Foreclosure - Order for sale of charged land - Application of conclusive evidence clause by Court - Whether proper - Duty of chargee - Whether only to show fact of inability to pay debt - Allegation of incorrect statement - Whether irrelevant - Consideration of Kandiah Peter v. Public Bank*

The appellant, the registered owner of a piece of land, had charged the land to the respondent as security for the payment of a banking facility. The appellant defaulted in the payment and Form 16D was issued by the respondent. The appellant failed to settle the debt and the respondent, in consequence, applied for foreclosure under s. 254 of the National Land Code. The appellant objected to the application, but the learned Judicial Commissioner, following *Kandiah Peter v. Public Bank*, gave leave nonetheless for the respondent to sell the charged land, ruling that "this Court shall accept the amount of the debt as conclusive and it shall not be the duty of this Court to ascertain the accuracy of the said amount." The appellant appealed. Before the appellate Court, the appellant sought to raise the issue, *inter alia*, of the incorrectness of the respondent's account. It was also contended that the trial Court was in error when it applied the conclusive evidence clause and proceeded to make the adjudication in question.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] Just like the Court below, this Court is bound by the decision in *Kandiah's* case. Thus, in considering the appellant's submission, this Court must have the principles in *Kandiah's* case in mind. This apart, it must also note that all the appellant's alleged points of dispute were never ventilated in the Court below.

[2] We were satisfied that neither the borrower nor the chargor of the land had ever disputed their accounts with the respondent. This account in

October 1993 at pp. 201 and 203 of the appeal record were produced without protest by the appellant themselves. These figures in pp. 201 and 203 tally with the figures in the affidavit filed by the respondent at pp. 143 to 145 of the appeal record.

[3] There was also no dispute as regards the principal advanced. Whatever mistake there was, it was in the computation of the overdraft. In any case, the mistake made was after the service of the Form D and therefore irrelevant for this Court's consideration.

[4] The conclusive evidence clause applies in this case, and therefore there was no need for the respondent to prove the amount. All the respondent had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the appellant to settle the loan. As to the allegation that the respondent's account was incorrect, following *Kandiah*'s case, the issue is irrelevant.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Gadaian - Halangtebus - Perintah untuk jualan tanah yang tergadai - Pemakaian fasal keterangan muktamad oleh Mahkamah - Samada wajar - Kewajipan pemegang gadaian - Samada hanya untuk menunjukkan hakikat ketidak-upayaan untuk membayar hutang - Pengataan penyata yang tidak betul - Samada tak relevan - Penelitian kes Kandiah Peter lwn. Public Bank.*

Perayu, pemunya berdaftar sebidang tanah, telah menggadaikan tanah itu kepada responden sebagai jaminan bagi pembayaran satu kemudahan bank. Perayu telah memungkiri pembayaran dan Borang 16D telah dikeluarkan oleh responden. Perayu telah gagal untuk menjelaskan hutang itu dan responden, berikutan itu, telah memohon untuk halangtebus di bawah s. 254 Kanun Tanah Negara. Perayu telah membantah permohonan itu, tetapi Pesuruhjaya Kehakiman yang bijaksana, berikutan kes *Kandiah Peter lwn. Public Bank,* telah namun begitu memberikan kebenaran bagi responden menjual tanah yang tergadai itu, sambil memutuskan bahawa "this Court shall accept the amount of debt as conclusive and it shall not be the duty of this Court to ascertain the accuracy of the said amount." Perayu telah merayui. Di hadapan Mahkamah Rayuan, perayu berusaha untuk membangkitkan isu, antara lainnya, mengenai akaun responden yang tidak betul. Juga ditegaskan bahawa Mahkamah perbicaraan telah salah pertimbangan ketika memakai fasal keterangan muktamad bila membuat adjudikasi yang dipersoalkan.

Diputuskan:

Oleh Abu Mansor Ali (menyampaikan penghakiman Mahkamah):

[1] Seperti Mahkamah di bawah, Mahkamah ini adalah terikat oleh keputusan dalam kes *Kandiah*. Dengan itu, dalam menimbangkan penghujahan perayu, Mahkamah ini mestilah mengambilkira prinsip-prinsip dalam kes *Kandiah*. Selain itu, ianya mestilah juga mengambil perhatian bahawa kesemua perkara pertikaian yang dikatakan oleh perayu tidak pernah disuarakan dalam Mahkamah di bawah.

[2] Kami berpuashati bahawa peminjam mahupun penggadai tanah tidak pernah mempertikaikan akaun-akaun mereka dengan responden. Akaun ini bagi bulan Oktober 1993 di m.s. 201 dan 203 dari rekod perayu telah dikemukakan tanpa sebarang bantahan oleh perayu sendiri. Angka-angka ini dalam m.s. 210 dan 203 adalah sama dengan angka-angka yang terdapat dalam afidavit yang telah difailkan oleh responden di m.s. 143 hingga 145 Rekod Rayuan itu.

[3] Tidak juga terdapat apa-apa pertikaian berhubung dengan jumlah utama yang telah didahulukan. Apapun kesilapan yang terdapat, ianya terdapat dalam pengiraan overderaf. Dalam apa keadaan pun, kesilapan yang telah dibuat itu adalah selepas penyampaian Borang D dan dengan itu adalah tak relevan bagi pertimbangan Mahkamah.

[4] Fasal keterangan muktamad terpakai dalam kes ini, dan dengan itu tidak perlu bagi responden membuktikan jumlah itu. Apa yang perlu ditunjukkan oleh responden bagi mendapatkan perintah untuk jualan dalam prosiding halangtebus adalah hakikat ketidak-upayaan perayu untuk menjelaskan hutang itu. Berhubung dengan dakwaan bahawa akaun responden adalah tidak betul, berikutan dengan kes *Kandiah*, isu itu adalah tak relevan.

[Rayuan ditolak.]

Case referred to:
Kandiah Peter a/l Kandiah v. Public Bank Berhad [1993] 4 CLJ 332

Legislation referred to:
National Land Code 1965, s. 254

For the appellant - D. Krishna; M/s. Francis Lim & Co.
For the respondent - Low Kim Leng; M/s. Soo Thien Ming & Shahrizat

JUDGMENT

Abu Mansor Ali JCA:

This is an appeal against the decision of the High Court Kuala Lumpur on 14 April 1995 giving leave to the respondent to sell by public auction the land charged by the appellant to the respondent. We heard arguments on 21 August 1996 at the end of which we dismissed the appeal with costs.

The simple facts of the case were as follows. The appellant was the defendant (hereinafter called 'the defendant') and the respondent was the plaintiff (hereinafter called 'the plaintiff'). The defendant who was the registered owner of land held under Grant 9994 Lot 1167 Section 41, District of Kuala Lumpur (hereinafter called 'the said land') had charged the said land to the plaintiff by way of security for the repayment of a banking facility granted to the defendant. When the defendant failed to settle the amount owing, the plaintiff issued Borang 16D dated 7 September 1993 under s. 254 of the National Land Code 1965 (hereinafter called 'the Code') in order to have the land sold to realise the debt.

The defendant failed to settle the debt. Thereafter the plaintiff applied for foreclosure under s. 254 of the Code. Inspite of the defendant's objection, the learned Judicial Commissioner granted the order for sale. Hence, this appeal by the defendant.

Shortly, the main point of the defendant's appeal turned on the proper implementation of the "conclusive evidence clause". The defendant contended that the Court ought not to have adjudicated basing itself on the conclusive evidence clause by reason of the fact, they say, that the guarantor was protesting that they had no knowledge of the details of the account. In doing so the Court had acted in error.

At p. 53 of the Appeal Record, the learned Judicial Commissioner held:

> Berhubung dengan isu pertama ini saya memutuskan Mahkamah ini terikat dengan kehakiman Mahkamah Agung dalam kes *Kandiah*. Saya juga memutuskan Fasal 14 membolehkan plaintif mengeluarkan penyata berhubung dengan jumlah yang terhutang dan plaintif dilepas dari beban untuk membuktikan keterhutangan itu. Mahkamah ini perlu menerima kenyataan keterhutangan yang telah dikeluarkan oleh plaintif sebagai konklusif dan tidak menjadi tanggungjawab Mahkamah ini untuk mengesah ketepatan jumlah tersebut.

Roughly translated: thus,

> Having regard to the first issue, I rule that this Court is bound by the judgment of the Supreme Court in the case of Kandiah. I also rule that cl. 14 enables the plaintiff to issue a statement relating to the amount due and the plaintiff is

> relieved of the burden of proving the debt owing. This Court shall accept the amount of the debt owing issued by the plaintiff as conclusive and it shall not be the duty of this Court to ascertain the accuracy of the said amount.

The learned Judicial Commissioner followed the principle laid down in *Kandiah's* case by which the Judicial Commissioner, following the principle judicial precedents, was bound. In the case of *Kandiah Peter a/l Kandiah v. Public Bank Berhad* [1993] 4 CLJ 332; [1993] 2 AMR 49 3464 Mohd. Eusoff Chin, SCJ held very clearly as follows:

> A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our Courts which have correctly stated the law upon the subject.

Mr. Low Kim Leng for the plaintiff submitted that the appellate Court, in considering the defendant's submission, had to start with the principles in *Kandiah's* case in mind. We found merit in that argument. Apart from that, we also uphold his contention and took note that all the defendant's alleged points of dispute were never ventilated in the Court below.

When the plaintiff's Counsel was asked by this Court to show us the correctness of the plaintiff's account, in the face of the apparent challenge by the defendant, we were firmly assured and were satisfied by the submission of the plaintiff's Counsel that neither the borrower nor the chargor of the land had ever disputed their accounts with the plaintiff. This account in October 1993 at pp. 201 and 203 of the appeal record were produced without protest by the defendant themselves. These figures in pp. 201 and 203 tally with the figures in the affidavit filed by the plaintiff at pp. 143 to 145 of the Appeal Record. The plaintiff's Counsel submitted further that if the defendant had seriously contended all the alleged errors, the defendant should have filed an affidavit in reply both in respect of the alleged errors and the different rates of interest which were never ventilated in the Court below. We also took note of the plaintiff's Counsel's submission that there was no dispute as regards the principal advanced. Whatever mistake there was, it was in the computation of the overdraft. What was most important was that the mistake made was after the service of the Form D and therefore irrelevant for our consideration. He submitted further that the figure in Form D was conclusive. Clause 14 of the charge annexure provides:

14. If and when the said account or accounts shall be closed pursuant to cl. 13 and a balance shall then be owing to the chargee by the borrower, the chargor or her or its legal representatives or successors in title or assigns as the case may be shall so long as the same or any part thereof shall remain owing and notwithstanding the chargee having obtained an order of sale under the National Land Code, pay to the chargee interest thereon at the rate prevailing at the date that the said account or accounts are closed, with monthly rests, computed from the time when such balance shall have been ascertained and the chargor agrees that the statement of the manager, assistant manager, accountant or other officer of the chargee as to the amount of such balance shall be final and conclusive.

Likewise, we are bound by the decision in *Kandiah's* case and we find no reason to disturb the decision of the learned Judicial Commissioner. Touching on the merit of the complaint, we have no hesitation in saying that the ground was without merit. We hold that the conclusive evidence clause applies and therefore there was no need for the plaintiff to prove the amount. All the plaintiff had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the defendant to settle the loan. As to the allegation of the defendant that the plaintiff's account had been incorrect, following *Kandiah's* case again, this issue must be regarded as irrelevant. If, as alleged by the defendant, there is a discrepancy in the conclusive evidence clause, it can only be resolved in a separate claim by him but to go outside the principle of the conclusive evidence clause, we hold, is to negate the principle in *Kandiah's* case.

We therefore dismiss this appeal with the order that the deposit is to go to the account of the plaintiff's taxed costs.

Reported by W.A. Sharif